

The Wilderness Society

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To: 18015394237

From: Barbara Young

Re:

Date: 06/30/2017

Attached please find a protest from The Wilderness Society and the National Audubon Society of selected parcels included in the September 2017 lease sale for the Fillmore Field Office

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*The Wilderness Society * National Audubon Society*

June 30, 2017

Via Facsimile: (801) 539-4237

Bureau of Land Management
Utah State Office
Attn: Sheri Wysong
440 West 200 South
Suite 500
Salt Lake City, UT 84101



Re: Protest of the September 2017 Oil and Gas Lease Sale in the Fillmore Field Office

Dear Ms. Wysong:

Please accept and fully consider this timely protest of Utah BLM's September 2017 Oil and Gas Lease Sale. We are protesting this sale because, in proposing to offer parcels UT0817 - 001 (UTU92485), 002 (UTU92486), 003 (UTU92487) and 007 (UU92491) (the Priority Habitat Management Area or "PHMA Parcels"), BLM violated key requirements of the Greater Sage-Grouse Environmental Impact Statement (EIS) Record of Decision (ROD) (BLM 2015), the Utah Greater Sage Grouse Approved Resource Management Plan Amendment (Utah ARMPA) and Instruction Memorandum 2016-143. As described in our comments on the Preliminary Environmental Assessment (EA), leasing the proposed parcels conflicts with the adaptive management, prioritization, and net conservation gain requirements in these management plans and their guidance. We have attached and incorporated our comments on the Preliminary EA by reference as Exhibit 1.

This protest challenges BLM's EA, DOI-BLM-UT-W020-2017-0001-EA, and the agency's decision to proceed with the sale of new leases located in the Fillmore Field Office (FFO). We specifically protest parcels UT0817 - 001 (UTU92485), 002 (UTU92486), 003 (UTU92487) and 007 (UTU92491).

1. The proposed action conflicts with the adaptive management requirements set forth in the Utah ARMPA.

Leasing the PHMA Parcels under the proposed action would conflict with the hard-trigger adaptive management requirements set forth in the Utah ARMPA. The PHMA Parcels fall within habitat of the most imperiled greater sage-grouse population in Utah. As described in a BLM February 2017 press release:

The [BLM] in coordination with state and federal partners have evaluated data related to the status of greater sage-grouse (GRSG) populations and habitat throughout Utah. The vast majority of GRSG populations throughout Utah remain at normal population and habitat levels based on criteria jointly developed by the

agencies. However, one population located in Juab, Tooele, and Utah Counties, the Sheeprocks area, has experienced a nearly 40 percent decrease in population over the last four years, with an annual decrease in eight of the last ten years.¹

Because of these significant population declines, the Sheeprocks population recently met the criteria for a “hard trigger” adaptive management scenario under the Utah ARMPA, which resulted in BLM converting the Sheeprocks’ habitat from GHMA to PHMA. *See* Revised EA, p. 23. The parcels we are protesting are located in the Sheeprocks area, with its highly imperiled population of sage-grouse.

As described in the Utah ARMPA, “[h]ard triggers represent a threshold indicating that immediate action is necessary to stop a severe deviation from GRSG conservation objectives set forth in the ARMPA.” Utah ARMPA, p. 4-3. A hard trigger leads to both automatic, “hard-wired” management changes but also requires that BLM review data and formulate a strategy to identify, address and correct causal factors that tripped the trigger:

“If monitoring indicates the hard trigger is met, a set of specific management actions from the BLM Proposed Plan will immediately be replaced with or adjusted by different management actions in the area where the trigger has been met... In addition to these specific changes, the BLM will review available and pertinent data for the area, in coordination with GRSG biologists from multiple agencies including the appropriate State of Utah agency, USFWS, and NRCS, to determine the causal factor(s) and implement a corrective strategy. The final strategy associated with a hard trigger being met will be the changes identified in Table 1.2 of Appendix I, and may also include the need to further amend or revise the RMP to address the situation and modify management accordingly, for the area where the trigger was met.”

“In addition to implementing the hard wired plan-level response, in the event that new scientific information becomes available demonstrating that the hard wired response would be insufficient to stop a severe deviation from GRSG conservation objectives set forth in the BLM plan, the BLM will immediately implement a formal directive akin to BLM Instruction Memorandum 2012-043 to protect GRSG and its habitat and *to* ensure that conservation options are not foreclosed in the area where the trigger has been met.”

Utah ARMPA, p. 2-14, Appendix I-10.

Our comments on the Preliminary EA pointed to the conflict between BLM authorizing new oil and gas development in the Sheeprocks PHMA while at the same time working to restore its population in compliance with the Utah ARMPA. *See* Exhibit 1. We described how leasing in

¹ BLM Utah State Office, “BLM implements measures to restore and maintain habitat for the Sheeprocks greater sage-grouse population in central Utah” (Feb. 6, 2017) *available at* <https://www.blm.gov/press-release/blm-implements-measures-restore-and-maintain-habitat-sheeprocks-greater-sage-grouse>.

the Sheeprocks PHMA undermines the other activities BLM is undertaking to restore the population and its habitat. *Id.* In the Revised EA, BLM offered the following response:

The BLM has followed the adaptive management plan outlined in Appendix I of the ARMPA by converting the Sheeprocks GHMA to PHMA and applying all the applicable stipulations and notices to the lease parcels. The portions of the parcels containing PHMA will be stipulated to have No Surface Occupancy (NSO). In addition, all of the parcels have portions that are outside of the PHMA (see Table 5 in the EA) and can be developed without surface disturbance within PHMA.

Revised EA, Appendix E, Response to Comment #10.

Although BLM has implemented a hard-wired management response for the Sheeprocks PHMA, the Utah ARMPA requires that BLM do more in response to the hard trigger scenario. The Revised EA provides no evidence that BLM has reviewed scientific data to determine and correct the causal factors that led to the hard trigger. As of February 2017, BLM had not met with all of the relevant state and federal agencies it is supposed to coordinate with to identify a corrective strategy. *See* BLM Press Release, *supra* note 1 (“The BLM will also meet with state and federal agencies and each of the counties to determine if other management changes are needed to reduce threats to this population...”); *see also* Revised EA, p. 23. Under the Utah ARMPA, BLM must determine whether a formal, interim directive is necessary to protect the Sheeprocks PHMA population before authorizing new site-specific activity. Utah ARMPA, pp. I-10 – 11.

Until BLM evaluates data and scientific information, coordinates with other agencies, identifies causal factors, and adopts a corrective strategy based on this analysis, leasing within the Sheeprocks PHMA will violate the adaptive management requirements of the Utah ARMPA. Before leasing can proceed, BLM must “review available and pertinent data for the area, in coordination GRSG biologists from multiple agencies including the appropriate State of Utah agency, USFWS, and NRCS, to determine the causal factor(s) and implement a corrective strategy.” Utah ARMPA, p. 2-14. The BLM has not done this. BLM cannot now take actions that will foreclose conservation options to adaptively manage and protect the Sheeprocks PHMA. *See* Utah ARMPA, Appendix I. Until BLM satisfies the adaptive management requirements of the Utah ARMPA, it must defer the PHMA Parcels. *See* 43 U.S.C. §1732(a) (The Federal Land Policy and Management Act provision that, “The Secretary shall manage public lands... in accordance with the land use plans developed by him...”).

2. BLM failed to prioritize leasing outside of greater sage-grouse habitat.

BLM has not prioritized leasing outside of sage-grouse habitat, as required by the Greater Sage Grouse EIS ROD, Utah ARMPA, and IM 2016-143. Under the Greater Sage Grouse EIS ROD:

In addition to allocations that limit disturbance in PHMAs and GHMAs, the ARMPAs prioritize oil and gas leasing and development outside of identified PHMAs and GHMAs to further limit future surface disturbance and to encourage new development in areas that would not conflict with GRSG. This objective is

intended to guide development to lower conflict areas and, as such, protect important habitat and reduce the time and cost associated with oil and gas leasing development. It would do this by avoiding sensitive areas, reducing the complexity of environmental review and analysis of potential impacts on sensitive species, and decreasing the need for compensatory mitigation.

EIS ROD, p. 1-23. The Utah ARMPA echoes this directive, including the following objective:

“Priority will be given to leasing and development of fluid mineral resources, including geothermal, outside of PHMA and GHMA. When analyzing leasing and authorizing development of fluid mineral resources, including geothermal, in PHMA and GHMA, and subject to applicable stipulations for the conservation of GRSG, priority will be given to development in non-habitat areas first and then in the least suitable habitat for GRSG.”

Utah ARMPA, p. 2-25. Further, in IM 2016-143, BLM has issued guidance elaborating on the way agency staff are to comply with the requirement to prioritize leasing and development outside of sage-grouse habitat:

Lands within PHMAs: BLM state offices will consider EOIs for lands within PHMAs after lands outside of GHMAs and PHMAs have been considered, and EOIs for lands within GHMA have been considered. When considering the PHMA lands for leasing, the BLM State Offices will ensure that a decision to lease those lands would conform to the conservation objectives and provisions in the GRSG Plans (e.g., Stipulations) including special consideration of any identified SFAs.

These prioritization requirements are non-discretionary. The Federal Land Policy and Management Act (FLPMA) requires that BLM comply with its land use planning decisions. *See* 43 U.S.C. §1732(a) (“The Secretary shall manage public lands... in accordance with the land use plans developed by him...”).² BLM is also bound by its own guidance. *Joe E. Fallini, Jr. v. BLM*, 162 IBLA 10, 38 (2004); *see also Cotton Petroleum Corp. v. U.S. Dept. of Interior*, 870 F.2d 1515, 1526 (10th Cir. 1989) (“... an administrative agency must explain its departure from prior norms (guidelines).”). To the extent that IM 2016-143 conflicts with the Utah ARMPA or the Greater Sage Grouse EIS ROD, the Utah ARMPA and ROD control. *Id.*

In the Revised EA, BLM claims to have satisfied the prioritization requirement by analyzing and assessing leasing in non-habitat areas first:

“IM 2016-143 notes that the BLM will use the specified ‘Prioritization Sequence, parcel-specific factors, and the BLM’s workload capacity and other workload priorities as they determine work Plans for the oil and gas leasing program.’ The IM emphasizes that it ‘does not prohibit leasing or development in General Habitat Management Areas (GHMA) or PHMA as the GRSG Plans will allow for

² *See also* 43 C.F.R. § 1610.5-3(a) in BLM’s reinstated planning regulations, which states, “All future resource management authorizations and actions . . . shall conform to the approved plan.” 48 Fed. Reg. 20,368 (May 5, 1983).

leasing and development by applying prioritizing sequencing, stipulations, required design features, and other management objectives and provisions in the GRSG Plans.’ The IM further clarifies by noting that the ‘guidance is not intended to direct the Authorized Officer to wait for all lands outside GRSG habitat areas to be leased or developed before allowing leasing within GHMAs, and then to wait for all lands within GHMAs to be leased before allowing leasing or development within the next habitat area (PHMA, for example).’

The FFO staff had sufficient resources to process and analyze all parcels within PHMA within the given time frame. An assessment to characterize sage-grouse habitat potential in areas that lie within PHMA was conducted on May 26-27, 2017. It was determined that the habitat declines sharply at the boundary of PHMA in this area; however, habitat of varying quality and quantity is available for sage-grouse use within the parcels that overlap with PHMA. A No Surface Occupancy stipulation applies to the parcels, which would adequately protect the portions of PHMA habitat in these parcels.”

In other words, BLM claims that it need only prioritize *the order* with which it processes lease nominations, beginning first with EOIs outside of sage-grouse habitat, then within GHMA, then within PHMA. According to the Revised EA, because BLM had the workload capacity to process all EOIs, it was not obligated to defer parcels within PHMA or GHMA to satisfy the prioritization requirements. **This interpretation of BLM’s obligation does not meet the nondiscretionary duty specified under the EIS ROD, Utah ARMPA and IM 2016-143 to prioritize leasing outside of sage-grouse habitat.**

Utah BLM made a similar argument in responding to protests as part of its June 2017 Richfield Field Office Oil and Gas Lease Sale:³

“The RFO staff had sufficient resources to process and analyze all 20 parcels and conduct site-specific analysis of the parcels within the PHMA within the given time frame. Had the RFO parcel list been larger and if there were inadequate staff resources, the RFO would have trimmed the parcel list to a manageable size by excluding parcels in GRSG habitat in accordance with the prioritization criteria. However, for the June 2017 Lease Sale, there was no need to apply the prioritization criteria because RFO staff were able to conduct the necessary site-specific analyses of all parcels, thus “parcel specific factors” were not discussed in the EA.”

These interpretations of the prioritization requirement are inconsistent with express language of the Utah ARMPA, EIS ROD and IM 2016-143. Although BLM is correct that IM 2016-143 does not prohibit new leasing in PHMA or GHMA, and the IM of course does not require that BLM lease all lands outside of PHMA and GHMA before

³ [https://eplanning.blm.gov/epl-front-office/projects/nepa/68693/107654/131928/BLM decision June 2017 ProtResponse WTS-final.pdf](https://eplanning.blm.gov/epl-front-office/projects/nepa/68693/107654/131928/BLM%20decision%20June%202017%20ProtResponse%20WTS-final.pdf), p. 2.

leasing within these areas, the IM and the Utah ARMPA do not prescribe using only a sequence of processing EOIs based on agency resources.

Rather, the Utah ARMPA and EIS ROD clearly requires that BLM prioritize leasing outside of PHMA and GHMA in “analyzing leasing *and authorizing development*.” P. 2-25 (emphasis added). Put another way, BLM must prioritize in both analyzing EOIs (i.e., lease nominations) as well as in actually deciding which parcels to offer for lease. BLM’s prioritization obligation does not end when it is able to analyze and assess all nominated parcels – it still must prioritize development authorizations (like leases) outside of PHMA and GHMA. In doing so, IM 2016-143 requires that BLM weigh a series of “parcel specific factors.” For these reasons, parcels 001, 003, and 007 should be deferred from leasing at this time and not offered at the September 2017 oil and gas lease sale. Prioritizing leasing outside of the PHMA is especially important here given that the protested parcels are located in the Sheeprocks area where sage-grouse are known to be declining precipitously.

3. BLM failed to apply or weigh the parcel-specific factors defined in IM 2016-143 in deciding to lease the protested parcels.

For each parcel in or near sage-grouse habitat, BLM must apply and weigh a series of “parcel specific factors” to reach a leasing decision. *See* IM 2016-143 (“This guidance is also intended to ensure careful consideration of the factors identified below when making any leasing and development decisions.”). The specific factors include:

- Parcels immediately adjacent or proximate to existing oil and gas leases and development operations or other land use development should be more appropriate for consideration before parcels that are not near existing operations. This is the most important factor to consider, as the objective is to minimize disturbance footprints and preserve the integrity of habitat for conservation.
- Parcels that are within existing Federal oil and gas units should be more appropriate for consideration than parcels not within existing Federal oil and gas units.
- Parcels in areas with higher potential for development (for example, considering the oil and gas potential maps developed by the BLM for the GRSG Plans) are more appropriate for consideration than parcels with lower potential for development. The Authorized Officer may conclude that an area has “higher potential” based on all pertinent information, and is not limited to the Reasonable Foreseeable Development (RFD) potential maps from Plans analysis.
- Parcels in areas of lower-value sage-grouse habitat or further away from important life-history habitat features (for example, distance from any active sage-grouse leks) are more appropriate for consideration than parcels in higher-value habitat or closer to important life-history habitat features (i.e. lek, nesting, winter range areas). At the time the leasing priority is determined, when leasing within GHMA or PHMA is considered, BLM should consider, first, areas determined to be non-sage-grouse habitat and then consider areas of lower value habitat.

- Parcels within areas having completed field-development Environmental Impact Statements or Master Leasing Plans that allow for adequate site-specific mitigation and are in conformance with the objectives and provisions in the GRSG Plans may be more appropriate for consideration than parcels that have not been evaluated by the BLM in this manner.
- Parcels within areas where law or regulation indicates that offering the lands for leasing is in the government's interest (such as in instances where there is drainage of Federal minerals, 43 CFR § 3162.2-2, or trespass drilling on unleased lands) will generally be considered more appropriate for leasing, but lease terms will include all appropriate conservation objectives and provisions from the GRSG Plans.
- As appropriate, use the BLM's Surface Disturbance Analysis and Reclamation Tracking Tool (SDARTT) to check EOI parcels in PHMA, to ensure that existing surface disturbance does not exceed the disturbance and density caps and that development of valid existing rights (Solid Minerals, ROW) for approved-but-not-yet-constructed surface disturbing activities would not exceed the caps.

In the Revised EA, BLM failed to apply several of these factors or publicly weigh the factors to reach a leasing decision. Most notably, BLM neglected to consider the "the most important factor": whether each parcel is near existing leases or development. *See* Revised EA, pp. 22-24, 33, 37. Indeed, based on the Revised EA's Reasonably Foreseeable Development Scenario, it appears that many of the leases in this Sheeprocks area with its highly imperiled sage-grouse population are far from existing development and fall on lands with low potential for successful development:

[T]he great majority of parcels leased in the region in the past have never undergone any drilling activity... only nine (9) Federal wells have been drilled on 54 acres in Juab County, which is the county where all of the proposed parcels are located, over the last 60 years, and all of these wells have been plugged and abandoned. The most recent APD... was approved in September 2013 for a well that is located on private surface and private mineral estate and was plugged and abandoned in 2014.

EA, pp. 8-9. A review of data in the LR2000 system also shows that there are no active coal, solar, or wind energy development projects near the parcels. Thus, it appears that "the most important" parcel specific factor weighs against a leasing decision. However, BLM did not even address this factor in the EA or describe how the factors led to its final leasing decision.

In other recent lease sale EAs, BLM applied the parcel specific factors and described how the factors informed its proposed action. For example, in the Preliminary EA for Wyoming BLM's August 2017 Lease Sale, BLM analyzed and applied the parcel specific factors to justify a deferral decision:

After careful review of the parcels, the BLM has determined that it was appropriate to defer certain parcels nominated for inclusion in the August 2017 oil and gas lease sale... These deferrals were made consistent with the BLM's sage-grouse conservation plans and strategy, which direct the BLM to prioritize oil and gas leasing and development in a manner that minimizes resource conflicts in order to protect important habitat and reduce development time and costs. Parcels deferred are generally located in sage-grouse important life-history habitat features such as active or occupied leks, and/or are not proximate to existing development, and are in areas of low oil and gas development potential.

Wyoming Preliminary EA, pp. 1-2 – 1-3. In that same sale, BLM also applied the parcel-specific factors to justify a decision to carry forward parcels for leasing:

Parcels WY-1708-153 and WY-1708-154 are proximate or adjacent to federal oil and gas leases with active development and production (within 2 miles of leases currently held by production), and have no known sage-grouse leks within the boundaries. The area is also proximate to bentonite mining claims, disturbance, and activity.

Wyoming Preliminary EA, p. 3-8. Thus, in the Wyoming sale, BLM proposed deferring parcels on lands with high-quality sage-grouse habitat, low potential for oil and gas development, and minimal nearby development, and it proposed carrying forward parcels on lands with lower-quality habitat near existing development. BLM clearly applied and weighed the factors to reach a reasoned leasing decision. This process and reasoning is not apparent in this Utah lease sale despite the parcel specific guidance factors specified in IM 2016-143.

As another, more recent example, in the Preliminary EA for Utah's December 2017 Oil and Gas Lease Sale in the Vernal Field Office, BLM applied each of the parcel specific factors to each of the proposed parcels in or near sage-grouse habitat. For each individual parcel, BLM determined whether it was adjacent to an existing lease, within an existing unit, within an area with a field development EIS, or within an area with high development potential. *See* Vernal Preliminary EA, p. 35 – 45. BLM also evaluated the quality of the sage-grouse habitat within each of the parcels, including the amount and percentage of winter and brood-rearing habitat and the distance of each parcel to nearby leks. *Id.* BLM clearly and carefully applied each of the relevant parcel specific factors to each of the parcels. It also directly addressed the “most important factor” - the proximity of the leases to existing leases and development.

These examples underscore the inadequacy of the Revised EA and confirm that when parcels are proposed in or near PHMA and GHMA, BLM must apply the prioritization sequence and weigh the parcel-specific factors in reaching a leasing decision. *See* IM 2016-143 (“This guidance is *also* intended to ensure *careful consideration* of the factors identified below when making any leasing and development decisions.”) (emphasis added). Because BLM did not do so in the Revised EA, BLM must defer the PHMA Parcels.

4. BLM failed to ensure a net conservation gain for greater sage-grouse.

BLM has not undertaken management actions necessary to ensure a net conservation gain to greater sage-grouse in the Sheeprocks area. Under the Utah ARMPA:

In all GRSG habitat, in undertaking BLM management actions, and, consistent with valid existing rights and applicable law, in authorizing third-party actions that result in habitat loss and degradation, the BLM will require and ensure mitigation that provides a net conservation gain to the species, including accounting for any uncertainty associated with the effectiveness of such mitigation. This will be achieved by avoiding, minimizing, and compensating for impacts by applying beneficial mitigation actions.

p. 2-9. The purpose of the net conservation gain requirement is to “[m]aintain and/or increase GRSG abundance and distribution by conserving, enhancing or restoring the sagebrush ecosystem upon which populations depend...” *Id.* at p. 2-3. Like the prioritization requirement, the net conservation gain requirement is a binding obligation of a governing land use plan. *See* 43 U.S.C. §1732(a) (“The Secretary shall manage public lands... in accordance with the land use plans developed by him...”).

In the Revised EA, BLM claims to have addressed the net conservation gain requirement by attaching Lease Notice UT-LN-131 to the proposed parcels. *See* REA, Appendix EA, Response to Comment #11. That LN provides:

In Priority and General Habitat Management Areas (PHMA and GHMA) all actions that result in habitat loss and degradation will require mitigation that provides a net conservation gain to the Greater Sage-Grouse (GRSG). Mitigation must account for any uncertainty associated with the effectiveness of the mitigation and will be achieved through avoiding, minimizing and compensating for impacts. Mitigation will be conducted according to the mitigation framework found in Appendix F in the Utah Approved Management Plan Amendment.

Again, the Utah ARMPA requires that “in authorizing third-party actions that result in habitat loss and degradation” (such as oil and gas leasing), BLM will “require and ensure mitigation that provides a net conservation gain... by *avoiding, minimizing, and compensating* for impacts by applying beneficial mitigation actions.” Utah ARMPA, p. 2-9 (emphasis added). However, by only attaching UT-LN-131, BLM deferred these mitigating actions to subsequent stages of the oil and gas development process. It is not apparent what, if any, mitigation requirements that would ensure a net conservation gain have been attached to parcels 001, 003, and 007.

Leasing confers valid existing rights and constitutes an irretrievable and irreversible commitment of resources. *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 717-18 (10th Cir. 2009). For purposes of the net conservation gain requirement, leasing “authoriz[es] third-party action[] that result[s] in habitat loss and degradation.” *See* Utah ARMPA, p. 2-9. The Utah ARMPA therefore requires that BLM take actions now, at the leasing stage, to avoid, minimize and compensate for the impacts of development within sage-grouse habitat. Because BLM did not contemplate or

take these actions as part of this lease sale, it contradicted the letter and intent of the Utah ARMPA. BLM must therefore defer the PHMA Parcels. Ensuring a net conservation gain for sage-grouse is especially important and relevant in this Sheeprocks area, where it is well-established that the sage-grouse population is under severe threat.

We hope to see BLM fully comply with the applicable land use plans and guidance prior to proceeding with leasing the protested parcels.

Sincerely,

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*** FAX RX REPORT ***

RECEPTION OK

JOB NO.	5326
DESTINATION ADDRESS	3033950383
SUBADDRESS	
DESTINATION ID	
ST. TIME	06/30 14:48
TX/RX TIME	06' 20
PGS.	11
RESULT	OK